SOME BY-PRODUCTS OF PRE-TRIAL

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In the last 25 years changes, almost basic in their character, have occurred in our courts. One of these has been the gradual emergence of what is known as "pre-trial." No legislation has been necessary for its development. It is a dramatic illustration of the inherent power of the courts to improve their service to the public.

Contrasted with the time that has usually elapsed between important improvements in common law procedure, the time required for pre-trial to win a definite place for itself has been remarkably brief.

Also, in contrast with former changes of this sort, most of which have been decidedly mysterious to laymen, pre-trial can be understood by almost anyone. It consists of informal discussions of cases with a judge before they go to trial. Surely this involves no mystery.

There is nothing new about such discussions. Courts have used them for years in a limited way. They were first employed systematically in America about 1929 by the Circuit Court of Michigan (Detroit) under the leadership of Chief Justice Ira W. Jayne; and they speedily became what Professor Edson R. Sunderland, our greatest authority on procedure, has described as "potentially the most effective instrument for shortening, simplifying and cheapening civil litigations that ever has been devised."

Just when, how and where the term "pre-trial" was first used seems doubtful. It probably appeared about 1929 or 1930 as the name of these conferences. In any event, it soon caught public fancy; and newspapers and others now use it to refer to almost anything that happens in a lawsuit prior to the trial.

At the outset, the conferences were employed to encourage the simplification of litigation by agreements as to the facts and as to the evidence to be submitted at the trial. This has been of immense service to the public. Before very long, however, valuable by-products emerged.

The conferences revealed the merit or lack of merit of the contentions of each side and to an increasing degree, in the conferences, the parties decided not to go further with the litigation but to settle it then and there.

Traditionally the courts have emphasized trials and devoted most of their efforts, resources and personnel to them and paid little attention to pending cases and what they might mean to the parties involved. It was generally believed that the only method available to a court to dispose of cases on its dockets was to try them. But today, to an increasing extent they are helping litigants dispose of their controversies while their cases are waiting to be tried.

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This has brought public approval, because for a long time court trials, with the delay, bother and expense involved, have had little to recommend them. People continue to go to the courts for help, but increasingly they seem to avoid trials.

There are good reasons for this. The public believes that trials are unnecessarily costly in time and money. Also, it disapproves vigorously of various methods used in trials, as, for instance, the rules which a hostile lawyer can and does use to prevent a witness, who obviously is honest and has knowledge of the situation involved, from testifying regarding it or from telling his story in a natural way.

Again, many people believe that trials are unnecessarily costly not only in money and time but in unnecessary attendance in court. Constantly, for years those called on jury panels have been disheartened by what they have seen and experienced in court. It is an understatement to say that trials are not popular or approved today by the average person who has had experience with them. All this could not fail to influence the work and operation of the courts and they have done just that.

One result seems to be a gradual but quite definite decrease in recent years in the percentage of the cases disposed of by the courts which are ended by a trial. In some courts, today, that figure is as low as 5%.

For instance, in the Supreme (Superior) Court of New York (New York and Bronx Counties) in 1942, of the jury cases disposed of, 31% were tried; in 1950, 15% were tried; in 1952, 10%; in 1956, about 5%—a falling off in fourteen years of about 84% in the ratio of cases ended by trial to the total number of cases disposed of.

In the Massachusetts Court in 1924, the percentage was 21%; in 1934, it was 13%; in 1944, it was 14%; in 1955, it was 11%—a similar falling off of some 47% in 31 years.

Presiding Judge Jayne of the Circuit Court of Michigan in Detroit reports as of April 1956, that more than 80% of the civil cases in his court are settled and that four of the eighteen judges of the court spend full time in pre-trial.

The limited use of trials is shown in the 1956 report of the New York Judicial Conference.[1] In the court year 1955-1956, one hundred and six trial judges of the Supreme (Superior) Court[2] tried to completion 1896 jury cases and 1641 non-jury cases[3], a total of about 6% of the cases disposed of.

An additional 2879[4] were ended during trial by dismissal or discontinuance, out of a total disposition of 52,328 cases, so that all dispositions in a trial courtroom were about 12% of the total dispositions.

No positive deductions should be drawn from the limited data we

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[1] STATE OF NEW YORK JUDICIAL CONFERENCE, First Annual Report, (1956).
[2] *Id* at 17.
[3] *Id* at 60.
[4] *Id* at 64.

now have on these conditions but enough does exist to raise a very serious question as to the extent of the future usefulness of the trial process as a major agency for the disposition of court business.

Furthermore, some efforts are being made to limit the use of trials because they are uneconomical from the taxpayer's standpoint.

It seems clear that most civil cases in Superior Courts are disposed of for less than $1,000. This means that for the court, the taxpayer, the litigant and the lawyer, trials often are wasteful procedures, for in most instances the true cost of the trial exceeds the amount recovered. Taxpayers spend from $300.00 to $800.00 per day to operate a jury courtroom in a Superior Court and, in addition, litigants pay the lawyers involved. This is not a very efficient, practical or sensible affair. It would not be tolerated in a well run business concern.

It seemed impossible to remedy this situation as long as the courts had no method of disposing of cases except by trying them. Pre-trial has created methods to modify this situation to some extent at least.

The Judicial Survey Commission of Massachusetts, created in 1954, urges the settlement of cases "all along the way and especially before the case reaches the docket or comes to trial"[5] and advocates "a vigorous effort to make pre-trial do its proper work (p. 99)."

The New York Temporary Commission on the Courts created in 1953 (being the twenty-sixth commission of that sort in that State), in its current report,[6] notes that 95% of the cases in the State Supreme (Superior) Court are settled and points out that "an ideal system would be obtained" if "the entire block of the 95% of settleable cases were settled at an early state" and trial calendars could consist "only of 5% of cases that will necessarily be tried to conclusion."[7] It advocates also "a preliminary pre-trial settlement conference before they (pending cases) could be added to the regular trial calendar".[8]

Speaker Heck of the New York Assembly said, recently, "I believe the settlement should be implemented * * * an element of compulsion be introduced" and he urged that "lawyers be persuaded to settle these cases as early in litigation as is practical without impairing any substantial rights of litigants."

The 1954 report of the Judicial Council of California[9] points out that the settlement approach to litigation is gaining strong advocates throughout the country. It terms the trial process as "a last resort".[10]

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[5] MASSACHUSETTS JUDICIAL SURVEY COMMISSION REPORT at 95 (1955).

[6] 1955 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK (February 17, 1955).

[7] *Id.* at 27.

[8] *Ibid.*

[9] FIFTEENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA TO THE GOVERNOR AND THE LEGISLATURE (December 31, 1954).

[10] *Id* at 18.

Of course, every litigant is entitled to a trial of his case, but there is a practical side to litigation which may not be ignored; and it seems reasonably clear that the answer to the problems of our courts is not more judges or more trials but a wise use of the opportunities which our judges have to help litigants to end their cases in some other way.

About 1948 some courts, seeming to realize this situation, began to send cases from their backlogs into conference with a judge with the avowed purpose of disposing of as many of them as possible without a trial.

Some held general calls of all cases on their dockets, during which one judge called the calendar and the others held conferences to which he referred cases for discussion—a process which eliminated deadwood and ended many of them in the conferences.

In 1949, the New York Supreme (Superior) Court in Kings County (Brooklyn) and New York County (Manhattan) had a backlog of some 27,000 cases in these two counties; and it began to send them, beginning with the oldest, into conference with a judge with the specific purpose of helping the parties to end them without trial. In the next 6 years, 17,000 of these cases were disposed of by agreement to dispense with trial or by transfer to a lower court. But there still remain several thousand untried cases in each of these counties that defy settlement by agreement, and create a problem for which most courts seem not to have developed a solution.

This use of conferences to obtain settlements, and the fact that judges took part in them, met with bitter criticism from lawyers and judges in New York and elsewhere. But today there is a fairly general realization that the courts owe citizens more than a forum presided over by a judge in which to hold legal duels; and the use of settlement methods is spreading rapidly.

During the early years of pre-trial the conferences were not held until trial was imminent. That meant that the parties in cases which could be ended at any time, with the help of a judge, waited for relief, sometimes for years, because the courts would not give litigants that help, although it was something to which they were entitled and which the courts for generations had possessed full power to furnish. Also by permitting these conditions to continue the courts helped those that were using their facilities, not to obtain a trial, but to postpone meeting their obligations, or to gain their ends by hold-up methods.

In the last 2 or 3 years, we have seen what may well turn out to be the most important change in court methods in many a day, *i.e.*, the sending of new cases into conference with a judge almost immediately after they are at issue. It is due in large measure to our experience with pre-trial.

The Circuit Court of Michigan in Detroit was one of the first to do this. Since 1953, its new cases have been sent to conference within a

week after issue is joined. This results in the ending of about one-third of them without trial.

The Supreme Court of New York in New York County now puts its new cases through conference within a few weeks after issue with similar results.

In October, 1954, the English Supreme Court made it mandatory in all civil cases that plaintiffs, within seven days after the pleadings are closed, take out a summons for a hearing with a judge in which he must deal with all questions preliminary to the trial, including a possible transfer to a lower court, as well as all other matters adapted to secure a just, expeditious and economical disposal of the case. Many prompt settlements are resulting from this procedure.[11]

In several federal district courts, very soon after a case is at issue, a judge takes measures to become familiar with it, and to know what use the parties propose to make of the facilities and privileges of his court. This has been done by Judge Arthur F. Lederle in the United States District Court in Detroit for some time.

In the United States District Court in Chicago, it is a regular practice, as soon as a case is at issue, to set it down for a conference in accordance with a standing order which provides that "at the time the issues are joined in each civil case assigned to Judge Campbell the case will be placed on a pre-trial calendar." Frequently there is a second conference if further progress can be made on shortening the issue or on settlement. Otherwise, the case is set for trial.

In the Northern District of Ohio, Judge Frank L. Kloeb calls most of his civil cases into conference very shortly after they are at issue. Prior to the conference, counsel must file informal statements of the facts and references to law and statutes, on which they rely. This, Judge Kloeb says in a letter to the writer, "enables the court to discuss the case fully on an equality with counsel." Many settlements result.

This movement for putting new cases through conference soon after they are at issue means that, for litigants in the cases disposed of in this way, there will be no law's delay, no depositions, no interrogatories, no discovery proceedings, no trials, no appeals, no further time lost, no further expense incurred; something undreamed of a few years ago. These methods make a strong appeal to the public and they result in large measure from our experience with pre-trial.

Important as is this new procedure, its possibilities for usefulness, and indeed those of all pre-trial, are being impaired by litigants (and there are many of them) who refuse to settle their cases, except on their own terms, until they are threatened with immediate trial. Such people use the courts, not to get a trial (from the start they have never intended to try their case) but to get a better bargain in the settlement with which they plan

[11] 98 SOL. L. J. 598 (1954).

to end it at the very last moment when they face actual trial. They are interested in the courts, not as a place where they can try their cases, but as agencies which they can use to keep alive their cases and perhaps to embarrass their opponent as long as there is hope of making a settlement to their liking.

Lawyers can hardly be criticized for using such tactics but the courts can be criticized for allowing conditions to exist which make such tactics effective.

The inability of the courts to cope with this problem is due largely to their lack of elasticity in adjusting their facilities to meet emergencies. This inelasticity is created in part by the almost immovable walls that surround them—walls which seem impossible for them to scale or remove, such as constitutional provisions and statutes specifying the methods which they must use.

In recent years the State government in Oregon has attempted to remove this inelasticity to some extent by statutes permitting the courts to use temporary judges and to assign judges from one court to another. One of these statutes provides that when the business of the Supreme Court of the state is congested or one of the judges is unable to bear his part of the work of the court, it may designate a Circuit Court judge or judges as temporary members of the Supreme Court. But in March, 1956 this statute was declared unconstitutional[12].

Undoubtedly, there has been and still is a lack of appreciation on the part of the courts of the extent of their inherent powers to use methods or means which may facilitate their service to the public, and they hesitate to use new methods unless they are first authorized by the legislature; although this often is unnecessary. The almost abject surrender by the courts to the legislatures, over the years, of the powers they rightfully possess under the separation of powers, may have been good politics but it may be seriously doubted if it has been for the public interest.

These inherent powers may have never been more important than today when many courts are overloaded with cases waiting disposition (not by trial, for only a very few of them will ever be tried), but by methods other than trial which they must develop if they are to carry their load. One such method was devised by the Superior Court of Massachusetts and used for seven years (1935-1942). It was suspended during the war and was reinstated in 1956. Under it, pending cases are referred to lawyers selected from lists prepared by the local Bar Associations, to investigate them and report to the Court. In most instances judgment is entered on this report following full opportunity to all parties for objection and amendment. In these seven years, the system was employed in some 49,000 cases, all of which, except about 1,400, were disposed of without trial, although the right to a trial was preserved in every instance. This system has little resemblance to traditional pretrial, but it is an

[12] State ex rel Madden v. Crawford, 295 P 2d 174 (Ore. 1956).

attempt, and a successful one, to dispose of litigation prior to any trial.

This system, discontinued during the war, has now been reinstated.[13]

The inherent powers of a court and the basis of the auditor system were considered by Justice Brandies in his opinion in *Ex parte Peterson*.[14]

He said:

> Courts have (at least in the absence of legislation to the contrary) inherent powers to provide themselves with appropriate instruments required for the performance of their duty.[15]

Another significant change is found in the fairly general abandonment of secretiveness with respect to the facts of a case while it is being prepared for trial and before the evidence is actually presented in court. Formerly, lawsuits were fought (to use Professor Sunderland's famous phrase) "from ambush". Now they are fought, for the most part, in the open.

This change has come about since pre-trial was first used. Undoubtedly, this is due to some extent to our experience with pre-trial conferences.

Pre-trial may have changed our concept of the function of our judges. Perhaps they are to be no longer regarded only as impartial moderators or umpires in courtroom duels; but in addition, as wise, understanding friends of those who seek relief in courts, ready to help with their common sense, wisdom and their knowledge of the law and of human nature, to adjust differences quickly and with just as little expenditure in time and money as is possible. Surely this is an end greatly to be desired.

A bill passed in 1956 by the New York legislature may have only remote relationship, if any, to pre-trial but it may reveal something of the change of attitude of the public toward trials and the technicalities that precede them and are involved in them. It provides that "a civil action may be commenced without the service of a summons or may be continued after the service of a summons without pleadings by the filing of a statement signed and acknowledged by all the parties to the action." This indeed is a far cry from the days of replies, rejoinders, surrejoinders, rebutters, surrebutters and the like which were a part of the pleading of former years.

Only those familiar with the traditions of the courts can realize how fundamental the changes we have seen in recent years, and are seeing today, may become. Probably no one knows just what has prompted many of them. Certainly some of them can be attributed in part at least to our experience with pre-trial.

For these, and many other reasons, it seems most appropriate that law students, the lawyers of the future, into whose hands these problems must soon pass, should publish this symposium and become familiar with them.

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[13] Statement by Chief Justice Reardon of Superior Court of Massachusetts, Boston Herald, Jan. 8, 1956, p. 1.

[14] 253 U. S. 300 (1919).

[15] *Id* at 312.